IN THE

Supreme Court of the United States

October Term, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN, FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of Health, Education and Welfare of the United States, and HAROLD HOWE, 2d, as Commissioner of Education of the United States,

Appellees.

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

I. Direct Appeal to this Court

For the first time in its brief addressed to the merits of this appeal, the Government has asserted that the case should not be here on direct appeal and that a three-judge court was not necessary in the first instance. Its explanation for this delay is that "the issues have been clarified by the appellants' presentation" (Government's brief, p. 5), and that in "their opening brief in this Court * * * appel-

lants have provided elaboration of the nature of their suit * * *" (*ibid.*, p. 10). We submit that there is nothing in our opening brief which adds substantively to, or in any way modifies, what we have stated in our complaint, briefs and oral argument before Judge Frankel, briefs and oral argument before the three-judge court, and in our Statement as to Jurisdiction in this Court.

It has been our position throughout the proceedings that the programs challenged are not authorized by the statute *and* that, if they are, the statute is unconstitutional. Such a case is properly heard by a three-judge court and appealable directly to this Court.

The thrust of the complaint in this case is the same as that in *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1954). There, as here, the complaint alleged that regulations issued by a Government agency (there the Wage Stabilization Board) "are not authorized by statute, or that, if purporting to be so authorized, the statute violates the Federal Constitution" (*ibid.*, p. 541). The case came to this Court on direct appeal from a three-judge court and was decided by this Court on the merits.

The Government's contention here was asserted in *Zemel* v. *Rusk*, 381 U.S. 1 (1965). The Court disposed of it in the following language (at 5-6):

> * * * It is true that appellant's argument—that either the Secretary's order is not supported by the authority granted him by Congress, or the statutes granting that authority are unconstitutional—is two-pronged. But we have often held that a litigant need not abandon his nonconstitutional arguments in order to obtain a

three-judge court: "The joining in the complaint of a nonconstitutional attack along with the constitutional one does not dispense with the necessity to convene such a court."

In *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960), the Court said (at 76-77):

> * * * Appellees concede that if the complaint had attacked §792 *solely* on the ground of conflict with the United States Constitution, the action would have been one required by [28 U.S.C.A.] §2281 to be heard and determined by a District Court of three judges. But appellees contend that because the complaint also attacks §792 on the ground of conflict with the Federal Agricultural Marketing Agreement Act of 1937 and the Secretary's Florida Avacado Order No. 69, it is possible that the action could be determined on the statutory rather than the constitutional ground, and, therefore, the action was not required to be heard by a District Court of three judges under §2281 and, hence, a direct appeal does not lie to this Court under §1253.
>
> Section 2281 seems rather plainly to indicate a congressional intention to require an application for an injunction to be heard and determined by a court of three judges in *any* case in which the injunction may be granted on grounds of federal unconstitutionality. * * * (Emphasis in original.)

In *Lee* v. *Bickel*, 292 U. S. 415 (1934), the Court, in a unanimous opinion by Mr. Justice Cardozo, said (at p. 417):

> The appellees, complainants in the court below, have brought this suit against the appellant, the comptroller of the state of Florida, to restrain the enforcement of a Florida statute for the levy and collection of stamp

taxes upon the documents described in the bill of complaint.

Their contention has been and is that the statute, properly construed, does not apply to the transactions stated in the bill, and that, if so applied, it is in conflict with the due process and commerce provisions of the Constitution of the United States. Amendment 14; art. 1 §8.

A District Court of three judges granted an interlocutory judgment (5 F. Supp. 720) which thereafter was made permanent. The case is in this court upon an appeal by the state comptroller. * * *

The Court took jurisdiction of the appeal and decided the case on the merits without ever reaching the constitutional issue. The Court said (at p. 425):

> * * * The taxation of the documents being without warrant in the statute, there is no duty to determine whether the constitution would be infringed if the meaning were something else. * * *

In *Sterling* v. *Constatin*, 287 U. S. 378, 388-9 (1932), "complainants denied that the Governor, under the Constitution and statutes of the state, could lawfully exercise the authority he had assumed, and specifically alleged that, if any statute of the state conferred such authority, it contravened stated provisions of the Constitution of the state and the due process and equal protection clauses of the Fourteenth Amendment." This Court, in a unanimous opinion by Chief Justice Hughes, held that the case was properly heard by a three-judge court and decided on the merits a direct appeal to the Supreme Court. It said (at p. 393):

> * * * As the validity of the provisions of the state Constitution and statutes, if they could be deemed to au-

thorize the action of the Governer, was challenged. The application for injunction was properly heard by three judges.

It is entirely reasonable and logical that an alternative allegation of a Federal agency's want of statutory authority should not negate the appropriateness of a three-judge court and a direct appeal to this Court. This is so because in a real sense such an allegation is unnecessary and hence surplusage. Few principles are more firmly established than that

> * * * [w]hen the validity of an act of Congress is drawn in question and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Quoted in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348 (1936) (concurring opinion of Mr. Justice Brandeis).

There are innumerable cases in which the Court has refused to pass on the constitutionality of a statute because the statute reasonably construed does not authorize the action challenged by the plaintiff.[1] Thus, in the present case, if the plaintiffs had alleged only that the Elementary and Secondary Education Act of 1965 was unconstitutional to the extent that it authorized use of Federal funds to finance instruction in or books for sectarian schools, can it be doubted that the Court would have first considered and

1. See, for example, *Lee* v. *Bickel, supra; Ex parte Endo*, 323 U. S. 283, 297 (1944); *Peters* v. *Hobby*, 349 U. S. 331, 338 (1955); *Kent* v. *Dulles*, 357 U. S. 116, 129 (1958); *Greene* v. *McElroy*, 360 U. S. 474, 507-8 (1959).

passed upon the question whether the Act does in fact authorize such use?.

We have been unable to find a single case in which this Court dismissed a direct appeal from a three-judge court on the ground that the complaint alleged that if a statute authorized certain conduct the statute was unconstitutional. None of the cases cited in the Government's brief supports such a contention.

In *Kessler* v. *Department of Public Financial Responsibility Division,* 369 U.S. 153 (1962) (Government's brief, p. 9), the Court took jurisdiction of a direct appeal from a three-judge court.

In *Brown Shoe Company* v. *United States,* 370 U. S. 294 (1962) (Government's brief, p. 9), the question involved was the finality of the three-judge District Court decision. The Court held the decision to be final and accepted the appeal.

Thompson v. *Whittier,* 365 U.S. 465 (1961) (Government's brief, p. 9) was a *per curiam* dismissal of an appeal with no reason given for the dismissal.

In *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963) (Government's brief, p. 16), a single judge's determination was held proper because the action "did not contemplate injunctive relief" but only declaratory relief (372 U. S. at 155). In the present case, of course, the complaint prays for injunctive relief.

In *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171 (1939) (Government's brief, p. 17), a three-judge court was

held to have been inappropriate because the constitutional challenge was insubstantial. This is hardly the case here. The Government does not assert that the complaint herein does not raise a substantial constitutional question. Indeed, in view of the fact that the Court has noted probable jurisdiction, it is difficult to see how the Government could do so.

In *Phillips* v. *United States*, 312 U.S. 246 (1941) (Government's brief, p. 17) a three-judge court was held inappropriate because "the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law" (312 U.S. at p. 252), and because "an attack on lawless exercise of authority in a particular case is not an attack on the constitutionality of a statute conferring that authority even though a misreading of the statute is invoked as justification" (*ibid.*). Unlike the present case, there was no allegation that, if the Governor's action was authorized by state constitutional provision or statute, the latter would be violative of the Federal Constitution.

In *Ex parte Hobbs*, 280 U.S. 168 (1929) (Government's brief, p. 18) a single-judge court was held proper because, although plaintiff had raised a constitutional issue in his complaint, he elected not to pursue it but instead informed the judge that he conceded the constitutionality of the challenged administrative order, and the District Court judge issued an injunction based solely on the construction of the state statute and not on its constitutionality. This Court pointed out (at p. 172) that the dropping of the constitutional challenge did not divest the District Court

of jurisdiction since the complaint asserted diversity of citizenship as well as the constitutional ground.

Ex parte Bransford, 310 U.S. 354 (1940) (Government's brief, p. 18) held that a three-judge court was not required because the attack was not on the constitutionality of a statute but *solely on* "allegedly erroneous administrative action" (310 U.S. at 361). "The validity of the statute," the Court said (at p. 359), "is not involved." The inapplicability of *Bransford* to the present case is clear from the following sentence in the opinion (at p. 361):

> * * * Where by an omission to attack the constitutionality of a state statute, *its validity is admitted for the purposes of the bill,* a determination by the trial court that the assessment accords with the statute would result in the refusal of the injunction and the dismissal of the bill. (Emphasis added.)

In the present case the validity of the statute is not admitted, but vigorously contested; and if the Court finds that the appellees' actions accord with the statute, an injunction would not necessarily be refused and the complaint would not necessarily be dismissed.

Bailey v. *Patterson,* 369 U.S. 31 (1962) (Government's brief, p. 18) is likewise on its face clearly inapplicable. The Court said (at p. 33):

> * * * Section 2281 does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent.

In the present case, as we have noted, the Government does not contend that the claim of unconstitutionality is insubstantial.

International Ladies Garment Workers' Union v. *Donnelly Garment Co.*, 304 U.S. 243 (1938) (Government's brief, p. 21) was a suit by an employer against a labor union for an injunction against picketing and boycott in a labor dispute. It was "not a suit to restrain the enforcement of an act of Congress, and no application was made for ~~such~~ an injunction" (304 U.S. at 247). The Government was not even a party to the suit.

Finally, *Moody* v. *Flowers*, 387 U.S. 97 (1967) (Government's brief, p. 21) held that a three-judge court is not appropriate where "the action seeks to enjoin a local officer" or where the complaint challenges the constitutionality of only a local law or city charter. Obviously, neither of these situations is present in this case.

In sum, not a single decision cited by the Government in its brief supports its assertion that a three-judge court and a direct appeal to this Court were improper in this case because the complaint asserts alternative grounds for injunctive relief, one of which is want of statutory authority and the other unconstitutionality. On the other hand, we have cited five decisions of the Court uniformly showing that they are proper.

In any case, we find it difficult to understand why the Government should raise the question at this late juncture. It is not as if this Court lacks jurisdiction to bypass the Court of Appeals, where this Court deems it to be in the public interest, even if the decision appealed from were that of a single judge. It has done so on a number of occasions. *United States* v. *United Mine Workers of America*, 330 U. S. 258, 269 (1947); *Norman* v. *Baltimore and O. R.*

Co., 294 U. S. 240 (1935); *Ex parte Quinn*, 317 U. S. 1, 19-20 (1942); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935); *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U. S. 937 (1952). Certainly an expeditious determination of the constitutionality of the Elementary and Secondary Education Act of 1965, under which many millions of dollars of Federal funds are being expended in support of sectarian schools, is in the public interest.[2]

In the last cited case, Justices Burton and Frankfurter dissented on the ground that this Court should have the benefit of the light that might be cast on the issues by a decision of the Court of Appeals. But with all due respect, it is hard to see how any substantial amount of additional light can be brought to bear by argument and decision in the Court of Appeals. The question of standing in this case has been briefed and argued before Judge Frankel and briefed and argued again before the three-judge court, in each case followed by a full decision and in the latter case a detailed dissenting opinion. It has been argued, as of this writing, in eight briefs *amici curiae* in this Court on both sides. It has been the subject of extensive hearings before a Senate Committee at which practically every leading constitutional authority either testified in person or submitted a written statement. It has been discussed in numerous law review articles. It is hardly too much to suggest that, if ever a constitutional question has been ripe for determination by this Court, the issue of standing in this case is such a one.

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2. The *New York Times* of March 5 (p. 31) reports on a study of the use of funds under Title I of the Act for programs in sectarian schools in New Jersey. The study concludes, according to the *Times*, that the programs in half the schools involve aid to the institutions in violation of the Constitution.

II. The Commissioner's *Laissez-Faire*

We find it difficult to understand the Government's assertion that the U. S. Commissioner of Education neither exercises nor possesses any responsibility in respect to the manner in which state officials expend the Federal funds which he allocates to them. Almost every section of the Act indicates a Congressional intent to delegate to the Commissioner responsibility for assuring that the purposes and provisions of the Act are complied with. For the purposes of this appeal it is sufficient to cite the following:

Title I, Section 206 provides in part:

> (a) Any State desiring to participate in the program of this title shall submit through its State educational agency to the Commissioner an application, in such detail as the Commissioner deems necessary, which provides satisfactory assurance—
>
> * * *
>
> (2) that, except as provided in section 207(b), payments under this title will be used only for programs and projects which have been approved by the State educational agency pursuant to section 205(a) *and which meet the requirements of that section,* and that such agency will in all other respects comply with the provisions of this title, including the enforcement of any obligations imposed upon a local educational agency under section 205(a); * * * (Emphasis added.)

Section 205(a) provides in part:

> A local educational agency may receive a basic grant or a special incentive grant under this title for any fiscal year only upon application therefor approved

by the appropriate State educational agency, upon its determination (*consistent with such basic criteria as the Commissioner may establish*—

* * *

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; * * * (Emphasis added.)

On page 13 of its brief, the Government asserts that "neither the Act nor the regulations promulgated by the appellees express any preference on the question whether these services shall be provided on public, sectarian or even neutral premises." Is there any way of interpreting this other than as an approval by the Commissioner of use of Title I funds "to finance and aid, in whole or in part, instruction in reading, arithmetic and other subjects and for guidance in sectarian and religious schools" as alleged in our complaint (J.A. 8a)?

Title II is no less direct. Its opening paragraph reads:

Sec. 201(a) The Commissioner shall carry out during the fiscal year ending June 30, 1966 and each of the four succeeding years, a program for making grants for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools.

The operative section, 203, reads in part as follows:

> Sec. 203(a) Any State which desires to receive grants under this title shall submit to the Commissioner a State plan, in such detail as the Commissioner deems necessary, which—
>
> * * *
>
> (b) The Commissioner shall approve any State plan and any modification thereof which complies with the provisions of subsection (a).

On page 15 of its brief, the Government refers to a suit filed by counsel in this case in the New York Supreme Court as showing that the present case is really a suit against the city board of education rather than the Federal Government. An examination of the complaint in that case (a copy of which is being furnished to the Clerk of this Court for the Court's convenience) will show quite clearly why it was necessary to institute that suit. The Sixth Cause of Action (pp. 6-7) alleges that officials of the New York City board of education have exerted pressures upon public school teachers to agree to teach in sectarian schools. The Seventh Cause of Action asserts that the board of education has operated the Federal programs in such a way as to discriminate against children attending public schools. We obviously could not allege that these actions were authorized or approved by the United States Commissioner of Education or by the Elementary and Secondary Education Act of 1965, whose constitutionality is challenged in the present case. Had we asserted these causes of action in a Federal suit we would certainly have been met with a claim of abstention and necessity of exhausting state remedies. Finally, we call the Court's attention to the fact that the complaint in the state suit contains no cause of action based on Title II of the Elementary and Secondary Education Act of 1965.

III. *Frothingham* as a Jurisdictional Barrier

The major part of the Government's brief is devoted to supporting its contention that *Frothingham* v. *Mellon*, 262 U. S. 447 (1925), was decided on grounds of constitutional jurisdiction. We have, we believe, dealt adequately with this contention in our main brief, but we wish here to make one additional comment.

We concede in our brief that *Massachusetts* v. *Mellon*, 262 U. S. 447 (1925) may have been decided on constitutional grounds, but we note now that Mr. Justice Brandeis would not have agreed with that concession. In his classic concurring opinion in *Ashwander* v. *Tennessee Valley Authority*, 279 U. S. 288, 341 (1936), he said:

> The Court developed, for its own governance *in the cases confessedly within its jurisdiction*, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
>
> * * *
>
> 5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operations. * * * In *Massachusetts* v. *Mellon*, the challenge of the federal Maternity Act was not entertained although made by the commonwealth on behalf of its citizens. (*Ibid*, pp. 346, 348. Emphasis added. Citations omitted.)

We point out that Mr. Justice Brandeis was a member of the Court which without dissent decided *Massachusetts* v. *Mellon* and *Frothingham* v. *Mellon* and therefore was in a position to know what the Court intended in those cases.

IV. The Complexities of the Issues

On pages 49-54 of its brief, the Government asserts that the complexity of the issues raised in the present case and the large variety of fact patterns that may be presented in taxpayer's suits under the Elementary and Secondary Education Act of 1965 make such suits impracticable and inappropriate.

We are unable to see how the legal issues and fact patterns are particularly complex and multifaricus, nor why any other method of invoking judicial review would be more practicable or appropriate. In any event, the legal issues are certainly not more complex or the fact patterns more diverse than those involved in malapportionment suits which are quite analogous to taxpayers' suits in respect to the measurable quantity of the protagonist's interest. The experience since *Baker* v. *Carr*, 369 U. S. 186 (1962), indicates convincingly that the Federal judiciary has found quite manageable whatever practical problems may have arisen.

V. The AFL-CIO Brief *Amicus*

The briefs *amici curiae* in support of the appellees' position make substantially the same points as the Government's brief and therefore do not require additional response. One point in the brief *amicus* of the American Federation of Labor and Congress of Industrial Organizations does call for comment.

The AFL-CIO brief states (on p. 3):

> The present suit attacks this Title II aid to private schools which are church-connected as violating the

establishment of religion clause. If the Court holds that the plaintiffs have standing to maintain this suit, and if they ultimately prevail on the merits, the solution of the church-connected school problem, which was worked out by the Congress only after years of travail and delay, will be invalidated. Further, the AFL-CIO believes that any holding banning all aid of any type to church-connected schools would probably destroy the entire program of federal aid to secondary and primary schools. It is the best judgment of the AFL-CIO that federal aid to education cannot be preserved at the present time, any more than it could be enacted in the first place, without the votes of some Congressmen who will not support a program which wholly excludes church-connected schools from all participation.

Presumably some, at least, of the plaintiffs, and of the organizations supporting them, do not wish to torpedo federal aid to education, but believe that it can be saved even if all aid to private schools is barred by court decree. The judgment, and experience, of the AFL-CIO is otherwise.

We believe that this imputation of a dog-in-the-manger attitude to the Congress is unfair and unjustified. It is one thing for some Congressmen to refuse initially to vote for a program of Federal aid to education which does not include sectarian schools in its coverage, and to insist that Congress leave the question of constitutionality to the courts.[3] It is an entirely different matter to suggest that, once the courts have definitively decided that sectarian schools may not constitutionally be included in a program of Federal aid to education, the Congress will take the position that, if the sectarian schools cannot have it, neither

3. It is to this type of thinking that reference was made in the quotation in footnote 10 on p. 30 of the Government's brief.

will the public schools. By constitutional provision statute or judicial decision, every state in the Union forbids the type of aid to sectarian schools which is challenged in this suit. Yet none of the states has for that reason refused to support their public schools.

In any event, we believe it improper to submit the possibility that Federal aid to public education will not be forthcoming if the Constitution is complied with, as a ground for judicial consideration either in determining the merits or in deciding whether or not to assume jurisdiction.

Respectfully submitted,

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